



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDS 07208-2021

AGENCY DKT. NO. 2022-33242

**T.D. ON BEHALF OF N.D.,**

Petitioner,

v.

**AUDUBON PUBLIC SCHOOL DISTRICT**

**BOARD OF EDUCATION,**

Respondent.

---

**Keri Avellini Donohue, Esq.**, for petitioner, and **Sung Eun Lim, Esq.**, on the  
opposition brief, (Brain Injury Rights Group, Ltd, attorneys)

**William C. Morlok, Esq.** for respondent, and **Kaitlin McCaffrey, Esq.**, appearing  
at oral argument (Parker McCay P.A., attorneys)

Record closed: October 21, 2021

Decided: October 27, 2021

BEFORE **ELAINE B. FRICK, ALJ**:

**STATEMENT OF THE CASE**

Petitioner, a parent on behalf of their minor child/student, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA). Respondent, Audubon Public School District Board of Education (the District), seeks to dismiss the petition, due to petitioner's failure to respond and comply with participation in a resolution session or mediation session within the mandated thirty-day time frame. Petitioner opposes the motion.

## **PROCEDURAL HISTORY**

Petitioner's due process request was submitted by petitioner's counsel on July 26, 2021, to the New Jersey Department of Education, Office of Special Education Programs (OSEP). The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 25, 2021, to be heard as a contested matter. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. Respondent submitted its answer to the petition on September 7, 2021, with a motion for summary decision, seeking to dismiss the petition. Respondent requested that a settlement conference at the OAL be held in abeyance until the outcome of the motion. The matter was assigned to me and scheduled for a telephonic conference on September 28, 2021.

Petitioner's counsel, Sung Eun Lim, submitted opposition to the Board of Education's (BOE's) motion on September 28, 2021, prior to the telephonic conference. The telephone conference was conducted with counsel for the parties, Sung Eun Lim, and William C. Morlok. During the conference, Mr. Morlok indicated he would not be filing a reply to petitioner's opposition to the District's motion. Oral argument on the motion was scheduled for October 21, 2021, at 9:30 a.m., via Zoom, which both attorneys confirmed was an available date for them.<sup>1</sup> Hearing dates were agreed upon during the telephonic conference and scheduled in the future, in the event the motion would be denied.

Mr. Morlock submitted a confirming email on September 28, 2021, to my judicial assistant and to opposing counsel, confirming the date and time for the Zoom oral argument on the summary decision motion, and that he would not be filing a reply to petitioner's opposition. He also confirmed the hearing dates that were scheduled during the telephonic conference.

On September 29, 2021, Keri Avellini Donohue forwarded an email to the OAL, noting she was now attorney of record on behalf of petitioner, from the same law firm as Ms. Lim. My judicial assistant forwarded confirmation to all counsel on September 29, 2021, via email, that Ms. Donohue's letter of representation had been received at the OAL

---

<sup>1</sup> In person proceedings continue to be suspended at the OAL due to the COVID-19 pandemic.

and stated that a copy of the OAL notices for the scheduled oral argument and the hearing dates were attached to the email.

On October 12, 2021, a Zoom connection link was sent via email from the OAL to the parties, regarding the oral argument scheduled for October 21, 2021, at 9:30 a.m. That email was addressed to Ms. Lim, and to respondent's counsel, Mr. Morlock.

On October 21, 2021, at 9:30 a.m., petitioner's counsel failed to connect in at the appointed point for the oral argument. Kaitlin McCaffrey, counsel from respondent's law firm, was present to argue the motion, standing in for Mr. Morlok. At my request, Ms. McCaffrey sent an email to Ms. Donohue, advising her that we were awaiting her appearance for the Zoom oral argument. Ms. Donohue responded via email that she was unaware the matter was scheduled for oral argument and wanted to request an adjournment of the proceeding. At my request, Ms. McCaffrey sent a reply email to Ms. Donohue, directing her to connect to the Zoom proceeding.

Ms. Donohue connected to the Zoom proceeding via phone only, indicating that her video did not connect. She stated that the oral argument date was not put on the law firm's calendar. She denied having received the email from my judicial assistant, of September 29, 2021, confirming that Ms. Donohue was now counsel of record, which had attached to that email the OAL notices of the oral argument and hearing dates. Ms. Donohue had not received the link for the Zoom proceeding directly, and had to get it from former counsel of record, Ms. Lim, from her law firm. Ms. Donohue's request to adjourn the oral argument was denied. She requested to be heard later in the day, which was granted. The matter was rescheduled to be heard at 11:00 a.m.

At 11:00 a.m., Ms. Donohue and Ms. McCaffrey were present for the Zoom oral argument, both by audio and video transmission. Oral argument was heard, and the record closed on October 21, 2021.

## **FACTUAL DISCUSSION AND FINDINGS**

The following facts, pertinent to this motion, are undisputed and thus I **FIND** as **FACTS** the following:

Petitioner, T.D., is the parent of N.D., who is a minor child and special education student enrolled in the Audubon School District. On July 16, 2021, petitioner's counsel sent a letter to the District, regarding N.D. The letter was forwarded by the District to its counsel, Mr. Morlok. He sent email correspondence to petitioner's counsel on July 21, 2021, posing questions to petitioner's counsel about information contained in the letter regarding N.D. (Brief by Morlok, Ex B, pages 4-6.) Petitioner's counsel did not respond to Mr. Morlok's email.

On July 26, 2021, petitioner's due process request was received at OSEP.

Mr. Morlok sent a follow up email on August 2, 2021, to petitioner's counsel, inquiring again about information contained in her July 16, 2021, letter regarding N.D. (Brief by Morlok, Ex B, page 3.) Having not received a response, Mr. Morlok sent another email to petitioner's counsel on August 4, 2021, forwarding the same email thread, indicating "Hello, I am writing to follow up on the below." (Brief by Morlok, Ex B, page 3.)

On August 5, 2021, the District's answer to the petition was submitted to OSEP with a copy sent to petitioner's counsel.

On August 9, 2021, having still not received a response from petitioner's counsel, Mr. Morlok sent another email, forwarding the same email thread to petitioner's counsel, indicating, "Hello, I am writing again to follow up on the below, especially as to the requested IEEs. Thank you, Bill." (Brief by Morlok, Ex B, page 2.)

On August 10, 2021, at 12:28 p.m., a representative from the Office of Special Education Policy and Dispute Resolution (SPDR) sent an email to the parties, confirming receipt of the due process request on July 26, 2021, and indicating that the thirty-day resolution period would expire on August 25, 2021. (Brief by Morlok, Ex C, page 3-4.)

The email provided information regarding N.J.A.C. 2.7(h), highlighting the time frame for completing the resolution meeting, and indicating that SPDR would convene a mediation session, in lieu of the resolution meeting, at the mutual request of the parties.

On August 10, 2021, at 12:34 p.m., Mr. Morlok sent an email to Ms. Lim, forwarding the thread of email inquiries he previously sent to counsel going back to his first email to counsel of July 21, 2021. (Brief by Morlok, Ex B, pages 1-2.) He asked her to review the information within the emails and respond to him. (Brief by Morlok, Ex B, page 1.)

On August 16, 2021, at 9:44 a.m., Mr. Morlok sent another email to Ms. Lim, again forwarding the thread of email inquiries he previously sent to counsel, going back to his first email of July 21, 2021, contacting petitioner's counsel regarding her letter of July 16, 2021. (Brief by Morlok, Ex B, page 1.) Mr. Morlok made more detailed inquiries to Ms. Lim regarding her initial letter concerning petitioner's requested evaluations. He requested a response. (Brief by Morlok, Ex B, page 1.)

On August 16, 2021, at 10:23 a.m., Mr. Morlok forwarded to petitioner's counsel, via email, the SPDR's notification email of August 10, 2021, asking if Ms. Lim was available for mediation on September 10, 2021, "in the AM or PM[.]" (Brief by Morlok, Ex A, page 1.)

On August 17, 2021, at 4:06 p.m., Mr. Morlok responded to the August 10, 2021, notification email from SPDR, indicating he had emailed petitioner's counsel approximately five times to discuss evaluations and mediation and had not heard a response. He noted "For the record, Respondents [sic] demand a Resolution Session or mediation. If neither occur I request the opportunity to file a motion prior to transmittal." (Brief by Morlok, Ex C, page 3.) His email was copied to Ms. Lim via email.

On August 17, 2021, at 5:39 p.m., Ms. Lim responded to Mr. Morlok's email of 4:06 p.m., copying the SPDR representative, requesting information about proposed evaluators and the nature of the proposed evaluations, and requesting that emails between counsel should not be sent to a hearing officer or state agency unless the agency specifically requested same. (Brief by Morlok, Ex C, page 2.) Ms. Lim also noted, "Please

be advised that if we find that no independent provider will accept the DOE rate, Parents may request a hearing for an Order to conduct IEEs.” (Attachments to petitioner’s brief.)

On August 18, 2021, at 7:05 a.m., the SPDR representative responded to Ms. Lim’s email sent the day prior, August 17, 2021, at 5:39 p.m. (Brief by Morlok, Ex C, page 1-2.) The representative advised Ms. Lim of the thirty-day resolution period from the date petitioner filed their request for due process. The email further stated, “Please advise whether your client wishes to participate in a resolution meeting with the district or a mediation with the district and as state monitor. Additionally, please provide your availability for the same.” (Brief by Morlok, Ex C, page 2.)

Ms. Lim responded to the SPDR representative two days later, on August 20, 2021, at 2:59 p.m., stating “Good afternoon. Parent is willing to participate in mediation. She is available early October.” (Brief by Morlok, Ex C, page 1.) Mr. Morlok responded to that email within minutes, at 3:07 p.m., indicating “The District demands a resolution session prior to the expiration of the 30-day resolution period on August 25, 2021.” (Brief by Morlok, Ex C, page 1.)

On August 25, 2021, at 10:36 a.m., the parties were notified via email by OSEP that the file was being transmitted to the OAL, and to advise a representative at the OAL whether they wished to proceed with an agreed upon date and time for a settlement conference at the OAL. (Attachments to petitioner’s brief.) At 1:34 p.m. on August 25, 2021, Ms. Lim sent an email to the OAL representative, with a copy to Mr. Morlok, forwarding the OSEP email of August 25, 2021, stating “Good afternoon. Parent and counsel are not available on the proposed date. Would you please allow us to reschedule for a date in mid to late September?” (Attachments to petitioner’s brief.) Presumably, Ms. Lim was referring to the September 10 date offered by Mr. Morlok, in his August 10, 2021, email to Ms. Lim.

On September 7, 2021, at 8:23 a.m., Ms. Lim responded to the OSEP email of August 25, 2021, stating “Good morning. Parent and Parent’s attorney are available on 10/28.” (Brief by Morlok, Ex D, page 1.) At 4:49 p.m. on September 7, 2021, Mr. Morlok submitted this motion for summary decision, and requested that the motion be assigned

to an ALJ for determination, and requested the delay of scheduling an OAL settlement conference, since the decision on the motion could result in the matter being dismissed. (Attachments to petitioner's brief.)

Ms. Lim replied three days thereafter, on September 10, 2021, to Mr. Morlok, with copies to OSEP and the OAL representative stating:

As you know, We [sic] have communicated and contacted in our effort to find mutually-agreed upon dates. As you can see in the attached emails, we have offered dates. We have not ignored the school district attorney's outreach. September is full of religious holidays. We are willing to meet for the resolution meeting. Please offer several dates you are available and we will contact parents.

(Attachment to petitioner's brief.)

### **Arguments of the parties**

Respondent BOE contends that the matter should be dismissed. Petitioner was required to communicate their willingness to participate in the resolution meeting or mediation within the thirty-day time frame. They failed to respond to repeated requests by respondent's counsel. When petitioner's counsel did respond, she did not offer any dates within the thirty-day resolution period. Respondent contends petitioner did not comply with the regulations and their failure to do so shall result in the dismissal of this petition.

Petitioner asserts that although they did not respond within the thirty-day time frame with a proposed date for the resolution meeting or mediation, they were not "ghosting" respondent's counsel. Petitioner contends their desire to cooperate was communicated and they reiterated their willingness to participate in a resolution session after the matter was transmitted to the OAL. Petitioner acknowledges that they requested the date of October 28, 2021, as their first available date.

## **LEGAL ANALYSIS AND CONCLUSIONS**

The Individuals with Disabilities Education Act (IDEA) requires both parties in a matter to endeavor to resolve disputed issues asserted in a due process petition by participating in a resolution conference or mediation before the matter proceeds to a hearing. This is a federal and state law regulation requirement.

The IDEA provides that prior to proceeding to a hearing, the local education agency (LEA) shall convene a meeting with the parents, unless the parent and the LEA agree in writing to waive the meeting. 20 U.S.C. §1415(f)(1)(B)(i). This is echoed in the federal regulations, which indicate that the LEA must convene the meeting with the parent within fifteen days of receiving notice of the parent's due process complaint unless the parties have waived participation in same in writing. 34 C.F.R. §300.510(a). If the matter is not resolved within thirty days of receipt of the due process complaint, then the matter can proceed to a due process hearing. 20 U.S.C. § 1415(f)(1)(B)(ii).

The New Jersey regulations specify that when a parent requests a due process hearing, the district BOE shall have an opportunity to resolve the matter before proceeding to a due process hearing in a resolution meeting. N.J.A.C. 6A:14-2.7(h). The resolution meeting can only be waived by mutual agreement of the parties, in writing. N.J.A.C. 6A:14-2.7(h)9. If the matter is not resolved within thirty days, then the petition shall be transmitted to the OAL for a hearing. N.J.A.C. 6A:14-2.7(h)4.

If the parent does not cooperate with the BOE's efforts to schedule the resolution meeting or participate in mediation within the appointed thirty-day time frame, the district is entitled to assert its right to seek dismissal. 34 C.F.R. §300.510(b)(4). If the BOE has demonstrated that it made reasonable efforts to secure the cooperation of the parents to participate in the resolution process, and the parents failed to do so, the BOE's request to dismiss the due process petition should be granted. See, 34 C.F.R. § 300.510(b)(4); S.Z. and J.Z. o/b/o G.Z. v. School District of the Chathams BOE, EDS 08680-16, Final Decision, (July 15, 2016); and J.C. and S.C. o/b/o J.C. v. School District of the Chathams BOE, EDS 14176-18, Final Decision, (November 14, 2018).



Here, the regulations mandate that when petitioner submitted the due process petition to OSEP on July 26, 2021, the thirty-day clock begin to tick for the parties to participate in the resolution meeting or mediation through OSEP, unless written mutual waiver of participation was submitted to OSEP. Petitioner failed to respond with proposed dates or to confirm that they would participate in a resolution meeting or mediation prior to August 25, 2021, despite efforts by the district's counsel to schedule same and the SPDR representative reaching out to petitioner's counsel. Petitioner did not provide a mutually signed written waiver of participation in the resolution session or mediation.

The District reached out to petitioner's counsel within three days of having received the July 16, 2021, letter. Petitioner's counsel never responded, and instead forwarded the due process petition to DOE on July 26, 2021. The District continued to reach out to petitioner's counsel, with follow up emails requesting a reply regarding the evaluations sought in the due process petition, and to schedule the resolution meeting within the mandated time frame. The SPDR representative also sent communication to petitioner's counsel on August 10, 2021, and again on August 17, 2021, emphasizing the time frame in which the resolution meeting or mediation was to occur. I **CONCLUDE** petitioner was noticed and aware of the mandated time requirements to participate in resolution process. I **CONCLUDE** that petitioner was obligated to participate in the process.

Petitioner's counsel never responded to any of the District's seven email inquiries from July 21, 2021, through August 17, 2021, until late in the day on August 17, 2021. That response by petitioner's counsel did not even address the issue of a resolution session or mediation or offer a date for same. It did include reference to their requested evaluations and that if they could not find independent evaluators who would accept the DOE's rates, the parents may request a hearing. Petitioner's next email communication was on August 20, 2021, in response to the SPDR representative's email from two days prior. It was a curt response that the parent was willing to participate in mediation and was available in early October. Within a few minutes, Mr. Morlok responded, reiterating the District's request to conduct a resolution session or mediation before August 25, 2021. Petitioner's counsel never responded.

Five days later, on the deadline date of August 25, 2021, petitioner's counsel finally responded that the parents were not available on the proposed date, presumably referring to the date which had been offered in the District's email of August 10, 2021. Petitioner suggested a date in mid to late September. On September 7, 2021, petitioner's counsel finally responded to the SPDR's August 25, 2021, email, stating that petitioner and counsel were available for mediation on October 28, 2021. Such responses are not reflective of a sincere desire to comply with the regulations and came after the thirty days had expired. The petitioner's communications do not represent reasonable and cooperative steps to meaningfully engage in the mandated resolution process. The responses by petitioner's counsel, after the petition was transmitted to the OAL, were too little, too late. I **CONCLUDE** that petitioner failed to respond in a timely or meaningful manner, in accord with the mandates of the federal and state regulations. I **CONCLUDE** that the petition shall be **DISMISSED**, without prejudice, for petitioner's failure to comply with the requirement that they must cooperate in the scheduling of a resolution meeting or mediation session, within the thirty-day time frame. I thus **CONCLUDE** that the District's motion for summary decision to dismiss the due process petition is **GRANTED**, but done so without prejudice.

### **ORDER**

It is **ORDERED** that petitioner's due process petition shall be **DISMISSED**, without prejudice, for failure to comply with the requirement that petitioner cooperate in the scheduling of a resolution meeting or mediation session in a timely manner.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.



October 27, 2021  
\_\_\_\_\_  
DATE

\_\_\_\_\_  
**ELAINE B. FRICK, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

EBF/tat

**APPENDIX OF SUBMISSIONS**

Respondent's September 7, 2021, submission:

Notice of Motion for Summary Decision

Brief in Support of Motion for Summary Decision, with Exhibits A - D

Certification of Service

Petitioner's September 28, 2021, submission:

Opposition to Respondent's Motion for Summary Decision, with email attachments